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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 874

STEPHEN SPIRO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ESTHER STRUM FRANKEL
Counsel for Petitioner
455 East 42nd Street
Paterson, N. J. 07504

INDEX

PAGE

Citations to Opinions Below 1

Jurisdiction 2

Questions Presented 3

Constitutional Provisions, Statutes, Selective Service Regulations Involved 3

Statement of the Case 4

Reasons for Granting the Writ 12

I. The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court 12

II. The Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court 14

III. The Court of Appeals has disregarded the current trend of the United States Supreme Court to erect safeguards against erosion or waiver of constitutional rights by hard-pressed defendants charged with crime 16

Conclusion 19

Appendices:

A—Opinion of the District Court for the District of New Jersey 1a

PAGE

B—Findings of Fact and Conclusions of Law 2a

C—Opinion of the Court of Appeals for the Third Circuit 10a

D—Order Amending Opinion of the Court of Appeals for the Third Circuit 16a

E—Constitutional Provisions, Statutes and Regulations 18a

F—Letter from Chief of the Conscientious-Objector Section to New Jersey Appeal Board 26a

G—Letter from Petitioner to New Jersey Appeal Board 31a

Table of Authorities

Cases:

Abington School District v. Schempp, 374 U. S. 203 (1963) 15

Annett v. U. S. A., 205 F. 2d 689 (C. A. 10th, 1953) 14

Bolling v. Sharpe, 347 U. S. 497 (1954) 16

Cantwell v. Conn., 310 U. S. 296 (1940) 14

Clementino v. U. S. A., 216 F. 2d 10 (C. A. 9th, 1954) 14

Douglas v. California, 372 U. S. 353 (1963) 18

Escobedo v. Illinois, 378 U. S. 478 (1964) 18

Fowler v. Rhode Island, 348 U. S. 67 (1951) 15-16

Gideon v. Wainwright, 372 U. S. 335 (1963) 18

PAGE

Hinkle v. U. S. A., 216 F. 2d 8 (C. A. 9th, 1954) 14

Kedroff v. St. Nicholas Cathedral, 344 U. S. 94 13
Kretchet v. U. S., 284 F. 2d 561 (C. A. 9th, 1960) 14

Malloy v. Hogan, 378 U. S. 1 (1964) 18
Mapp v. Ohio, 367 U. S. 643 (1961) 18
Mayfield v. U. S., 220 F. 2d 729 (C. A. 5th, 1955) 14
McCollum v. Board of Education, 333 U. S. 203 (1948) .. 14
Miranda v. Arizona, 384 U. S. 436 (1966) 18
Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 (1950) 17
Murdock v. Pennsylvania, 319 U. S. 105 (1943) 14

Neimotko v. Maryland, 340 U. S. 268 (1953) 16

Riles v. U. S., 223 F. 2d 786 (C. A. 5th, 1955) 14

Shepherd v. U. S., 220 F. 2d 855 (C. A. 9th, 1955) 14
Sherbert v. Werner, 374 U. S. 398 (1963) 16
Sicurella v. United States, 348 U. S. 385 (1955) 12, 13, 14

United States v. Ballard, 322 U. S. 78 .....13, 15
U. S. v. Lauing, 221 F. 2d 425 (C. A. 7th, 1955) 14
U. S. v. Seeger, 380 U. S. 163 (1965) 15
U. S. v. Wierzchucki, 248 F. Supp. 788 (D. C., W. D. Wisc. 1965) 18

Walker v. Hutchinson, 352 U. S. 112 (1956) 17
Watson v. Jones, 13 Wall. 679 .....13, 15

PAGE

Constitutional Provisions:

Constitution of the United States

First Amendment 3, 14, 15, 16

Fifth Amendment 3, 16

Fourteenth Amendment 3, 14

Statutes:

5 U. S. C. Sec. 1005(a) 3, 16

28 U. S. C. Sec. 1254(1) 2, 3

50 U. S. C. App. Sec. 456(j) 3, 12

50 U. S. C. App. Sec. 460(b)(1) 3, 16

50 U. S. C. App. Sec. 462(a) 3, 4

50 U. S. C. App. Sec. 463(b) 3, 16

Selective Service Regulations:

32 C. F. R. Sec. 1604.41 4

32 C. F. R. Sec. 1604.71(a)(c)(d)(1)(3)(5) 4, 17

32 C. F. R. Sec. 1624.1(b) 4, 17

32 C. F. R. Sec. 1626.61(b) 4, 17

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Legend: Reference to the Record designated (R a) refers to petitioner's appendix in the Court of Appeals.

To the Honorable, the Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on October 20, 1967.

Citations to Opinions Below

The opinion of the District Court for the District of New Jersey is unreported and is printed in Appendix "A" hereto, *infra* p. 1a. At the request of the defendant, the

District Court made Findings of Fact and Conclusions of Law, which are printed in Appendix "B" hereto, *infra* p. 2a. The opinion of the Court of Appeals for the Third Circuit printed in Appendix "C" hereto, *infra* p. 10a, has not yet appeared in the reports. Order amending opinion of the Court of Appeals for the Third Circuit, is printed in Appendix "D", *infra* p. 16a.

Jurisdiction

The judgment of the Court of Appeals, affirming the conviction of the District Court, was dated and entered on August 29, 1967. On October 20, 1967, the Court of Appeals filed an order amending its opinion, but entered judgment denying a rehearing.

On November 9, 1967, petitioner made application for extension of time within which to file this petition. This was granted by order dated November 10, 1967, which extended time to and including December 4, 1967.

The Clerk of the Court of Appeals for the Third Circuit has entered an automatic stay of mandate, pending receipt of notice from the Clerk of the Supreme Court that this petition has been filed within time, in which event the mandate will continue until this Honorable Court has disposed of this case. In the meantime, the petitioner, who has been sentenced to confinement for two years in the custody of the Attorney General, has been continued on bail in the sum of $500.— on his own recognizance, by the District Court for the District of New Jersey.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented

There are two questions presented, viz.:

I—Does failure or refusal to recognize the Just War Doctrine followed by an adherent of the Roman Catholic Church, whom the Hearing Officer characterized as "a sincere and devout member of the Catholic Church who is sincere in his adherence to his views", constitute religious discrimination and negate the freedom of religion guaranteed by the First Amendment and the Due Process Clause of the Fifth Amendment?

II—Was a registrant denied procedural due process in his selective service processing, when the Local Board failed to advise him that he could consult a Government Appeal Agent, who would have ten days after notice of classification by the Appeal Board, within which to request the Appeal Board for a reconsideration, but instead, the Local Board mailed him an order to report for induction within six days?

Constitutional Provisions, Statutes, Selective Service Regulations Involved

Constitution of the United States, Amendments I, V and XIV;

Statutes:

5 U. S. C. Sec. 1005(a);
28 U. S. C. 1254(1);
50 U. S. C. App. Sec. 456(j);
Sec. 460(b)(1);
Sec. 462(a);
Sec. 463(b);

Regulations:

32 C. F. R. Secs. 1604.41;
1604.71(a)(c)(d)(1)(3)(5);
1624.1(b);
1626.61(b).

The provisions of these statutes or pertinent parts thereof are set forth in Appendix "E", beginning at p. 18a *infra.*

Statement of the Case

Following a trial before the U. S. District Court, for the District of New Jersey, sitting without a jury, on a charge of failing to submit to induction, in violation of 50 U. S. C. App. Sec. 462, petitioner was convicted.

The facts which gave rise to the charge are: Having registered on December 6, 1957, with New Jersey Local Board No. 4, when he reached his 18th birthday, petitioner received a classification questionnaire about a month later which he completed and returned, without signing Series VII dealing with conscientious objection to participation in war (R 7a, 34a).

About the middle of November 1962, petitioner requested the special form for conscientious objectors (Form 150) from his Local Board which he completed and returned, and was thereupon classified I-A-O (R 9a). He appealed, seeking an I-O classification, and his file was forwarded to the New Jersey Appeal Board on January 22, 1963 (R 10a). After an F.B.I. investigation, a hearing before a Hearing Officer and other processing the Appeal Board returned the file to the Local Board on December 14, 1964 (R 10a) classifying the petitioner I-A by a vote of 3 to 0

(R 13a). On December 15, 1964 the Local Board mailed Form 110, Notice of Classification, to the petitioner, advising him of the Appeal Board's decision (R 20a). Six days later, on December 21, 1964, the Local Board mailed Form 252, Induction Order, to the petitioner, ordering him to report for induction on January 6, 1965 (R 14a, 22a).*

At the appointed time and place, petitioner appeared at the induction center but refused to take the one step forward which would have marked his entry into the U. S. Army (R 68a).

Throughout his selective service processing, and at the trial petitioner explained his religious training as a member of the Catholic faith and amplified his religious beliefs.

The Roman Catholic Church has a traditional teaching, derived originally from St. Augustine, developed by St. Thomas Aquinas, and later doctrines. This teaching is passed down by priests of the Church as a holy covenant from generation to generation, is discussed by theologians, but is never officially promulgated in an official statement of Pope or Council, for the Church, the Institutional Church very rarely takes a position on war (R 37a-41a; 60a-62a).**

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* Following receipt of induction order and on December 24, 1964, the Local Board received a request from petitioner for a student deferment in that he was accepted as a night student at Fairleigh-Dickinson University at Teaneck, N. J., together with college verification (R 15a). This deferment was denied by letter dated December 28, 1964, inasmuch as petitioner was not a full time student at the time the induction order was mailed (R 15a).

Application by the registrant to the New Jersey State Director of Selective Service on December 29, 1964 for a postponement of his induction order to enable him to process a Presidential appeal, met with a similar rebuff, though the Rev. Herbert Rogers, Assistant Professor of Theology at Fordham University joined in this request (R 16a, 17a).

** During his trial, petitioner sought to introduce into evidence the "Pastoral Constitution on the Church in the Modern World",

The ethics textbooks list seven requirements which must be simultaneously verified before a war may be considered just and licit for Christian participation (R 35a). These requirements are (R 35a, 36a):

1. The war must be a last resort when all other means of settling the dispute have failed.

2. The war must be declared and conducted by legitimate authority. The ordinary usage of any government will suffice.

3. There must be a reasonable assurance of a successful outcome.

4. There must be a just cause for the war.

5. There must be a proportionality in which the good effects outweigh the evil. This must apply not only to the war as a whole but to any operation within the war.

6. There must be only the use of the legitimate means of warfare.

7. There must be a right intention on the part of those responsible for conducting and declaring the war, right intention being defined as the will to peace.

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promulgated by His Holiness Pope Paul the Sixth on December 7, 1965, which was the official statement of the Church on the Fostering of Peace, the Promotion of a Community of Nations, and the Avoidance of War, but the Government objected to it because it was not considered and in fact was not in existence during the selective service processing of the petitioner. The objection was sustained. It was marked Defendant's Exhibit No. 2 for Identification (R 44a-47a).

Moreover, there are prohibitions regarding activities which would make a war unjust and consequently, illicit for Christian participation. Primarily, the prohibitions apply to direct attacks upon civilians. A civilian is considered in the eyes of the Church innocent. One does not have the right to directly take the life of an innocent person. Consequently, any military activity directed at an innocent person is sinful (R 36a).

At his trial, petitioner testified that, these criteria considered, there has never been a just war throughout history, and it is unlikely that any future war would be just (R 58a, 59a, 62a-65a).

Petitioner submitted no fewer than 23 documents, which are in his selective service file, comprising letters or published articles written by himself, as well as letters, certificates or affidavits from eminent Catholics, holding responsible positions, who have known him and who have discussed this conscientious objector outlook with him. Some of them admitted that they differed radically with his views, but have nonetheless attested to the sincerity and depth of his religious convictions.

Petitioner had attended Catholic elementary schools and a Catholic military high school, where he received religious and secular training. There, no teaching had been given with respect to war or peace (R 72a, 73a). He had attended the University of Chicago, "on and off from 1957 to 1964", dropping out periodically to earn some money and then returning (R 51a).

During one of his drop-out periods on March 13, 1962, he was reclassified I-A by the Local Board (R 53a). Then in April 1962, he took an Air Force qualifying examination;

and in July or August of that year, he applied at Lakeview or Glenview Air Station in Illinois for preprocessing for the Naval Air Reserve (R 54a). However, he told these Services to hold his application as he might be going back to school in the Fall of 1962, in which case he would not enter the Service (R 54a, 55a).

Prior to the Fall of 1962, the petitioner had had no acquaintance with the Just War Doctrine, as it was not usually taught at the high school level (R 56a).

His development as a conscientious objector can best be explained in the words of the petitioner himself, and we quote (R 55a):

> "Around October or November of 1962, I was working in the Student Peace Union, National Office in Chicago, and New Directions, paper books sent a book called 'Breakthrough to Peace', edited by Merton, a Trappist Monk. It was to be reviewed by us. I read it and it opened up new areas of thought which I never realized existed.
>
> "So I started reading further. I read 'Modern War and Basic Ethics' by John Ryan, which goes into a very elaborate discussion of the doctrine of just war. This other book, 'Morality in Modern Warfare', edited by John Nagle, which has a series of essays on the general topic of war and morality from several points of view, and I had some conversations with Prof. Gordonson of Loyola University in Chicago, who is a —perhaps the best known Catholic spokesman on pacifism.
>
> "And after discussion, reading and prayer, I realized I had no choice really than to be a conscientious objector."

As part of the processing of his selective service appeal, petitioner was noticed to appear for a hearing before William P. Reiss, a Hearing Officer, who subsequently sent a report of this hearing to T. Oscar Smith, Esq., Chief, Conscientious Objector Section of the Department of Justice. Mr. Smith in turn made a report which he submitted to the Chairman of Panel No. 1 of the New Jersey Appeal Board, in which he stated:

> "The Hearing Officer found that the registrant is a sincere and devout member of the Catholic Church and is sincere in his adherence to his views notwithstanding that he came late to his conscientious-objector position, but that the registrant does not have a conscientious objection to participation in war in any form . . . The Hearing Officer recommended that the conscientious objector claim of the registrant be not sustained."

Mr. Smith also stated:

> "The Hearing Officer reported that the registrant frankly admitted that he could not in good conscience object to participation in a 'just war'; that he also admitted that his belief that the next war would be an unjust war is a matter of opinion; that he admitted that there is no officially stated Catholic Church opinion against war; that he admitted the presence of Catholic chaplains in the Armed Forces; that he admitted that his position was based on a political analysis of warfare from an historical as well as current point of view; that he admitted that he had no objection to the use of conventional or nuclear weapons against soldiers and would have no objection to being in the Armed Forces

of the United States equipped only with guns that shot bullets provided military policy prohibited the bombing of cities having no military value." (See Appendix "F", *infra* p. 26a for the full text.)

A copy of this report and recommendation was sent to the petitioner with instructions for refutation and answer.

Within the time allotted for response, petitioner sent a letter to Panel No. 1 of the New Jersey Appeal Board, from which we quote, in part:

> "The report of the Department of Justice comments that 'he also admitted that his belief that the next war would be an unjust war is a matter of opinion.' The hearing officer did indeed ask me if I agreed with him that my belief in the unjustness of the next war was an opinion, and I did agree with him. However, upon reflecting on that statement, I feel that 'opinion' is not quite the correct word. I think that my belief in the unjustness of the next war would more appropriately be called a 'judgment', that is, an analysis or interpretation which forms the basis for action. In seeking guidance for the determination of such a judgment, I look first to the Church.
>
> "The Church, as the Church, has no official position on the application of its teachings to possible future political events. On the other hand, many theologians agree with my position, and I have in fact based my position in large measure upon the statements of these theologians. On the other hand, the presence of many priests in the armed forces indicates that there is by no means any unanimity on the question among Churchmen. The next place to seek guidance is from the gov-

ernment; but in this case, such a quest is futile—no government, no civil authority would admit to an unjust war, even if in fact it were intending to wage one such wilfully. Therefore, I am forced to rely on my own conscience, which the Church teaches must always be our ultimate and final guide. My conscience has formed a judgment, which I must accept and follow.

"Although I said that I could participate in a just war, even in a combatant status, this was purely a theoretical statement. If I had wings, I could fly. I maintain that this 'just' war is, in the real world, not capable of occurring; that as a result of the Sin of Adam and the consequent Corruption of the Human Will, it is inconceivable that a just war will ever happen—since there never has been one, as far as I can tell, and I hardly expect that Men will suddenly change. Consequently, I must refuse military service." (See Appendix "G" *infra* p. 31a for the full text of petitioner's refutation).

In making his report to the New Jersey Appeal Board, Mr. Smith made the following recommendation:

"The Department of Justice concurs in the Hearing Officer's determination and recommends to your board that the conscientious-objector claim of the registrant be not sustained and that he be not classified in Class I-O or in Class I-A-O."

The New Jersey Appeal Board followed this recommendation and classified the registrant I-A, 3 to 0. The induction order, the refusal to submit to induction and the indictment were the inevitable consequences.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioner's opposition to participation in war unless seven requirements are simultaneously verified by Catholic criteria, before the war can be considered a just war, is analogous to the position of Jehovah Witnesses, who stand ready to fight in a Theocratic War and at Armageddon, but in no other war.

Having satisfied itself that the applicant is sincere in his beliefs, this Court has held in *Sicurella* v. *United States*, 348 U. S. 385 (1955) that he was entitled to exemption under Sec. 6(j) of the Universal Military Training & Service Act [50 U. S. C. App. 456(j)] despite his readiness to fight in a Theocratic War and his willingness to use force to defend his ministry, Kingdom interests and his fellow brethren.

This Court has laid down the test that it is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to *participation* in war; and inasmuch as history does not record any Theocratic War since Biblical times, the possibility that it can happen in the future is rather remote.

So, too, with petitioner herein. After he filed his claim as a conscientious objector, he maintained in his statements before the selective service system, that measured by Catholic criteria there never had been a Just War through-

out history and it is highly inconceivable that any future war would be just. His statement to the Hearing Officer that he would fight in a Just War was still within the context of his religious beliefs, as it presupposed that the seven criteria for a Just War would have been met.

As the petitioner has so ably stated in his letter to the Appeal Board (App. "G", p. 33a *infra*), "I maintain that this 'Just War' is, in the real world, not capable of occurring."

Nor need objections to war necessarily be objections to taking life. It is sufficient when these objections are based on Church doctrine. Neither the 1948 Act nor the 1951 Act made any reference to refusal or reluctance to take life, as a standard for conscientious objection. So long as this opposition to participation in war is predicated on religious grounds, that is all that was required. The conscientious objector provisions were intended to extend even to members of the Catholic Church adhering to the Just War doctrine.

The religious expression of what constitutes a Just War by Thomistic criteria of the Catholic Church is an ecclesiastical determination, having the force of *jure divino,* which cannot be questioned in secular tribunals. An ecclesiastical determination is binding on all governmental bodies and the Courts. *Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94; *Watson* v. *Jones,* 13 Wall. 679, 727; *United States* v. *Ballard,* 322 U. S. 78, 85-88.

However, if the Court of Appeals for the Third Circuit was correct in considering that the issues in the *Sicurella* and *Spiro* cases were unrelated, then we find that:

II.

The Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

There is little doubt that the outcome of numerous litigated cases* has forced the selective service system to accord conscientious objector status to those Jehovah Witnesses who will accept it and not insist on being classified as ministers.

Can the Courts permit the Selective Service System to discriminate against Catholic conscientious objectors and deny them similar status?

Time and again this Court has affirmed the importance of the First Amendment's mandate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof", and this prohibition has been extended to the States by the Fourteenth Amendment. *Cantwell* v. *Conn.*, 310 U. S. 296, 303 (1940); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 108 (1943); *McCollum* v. *Board of Education*, 333 U. S. 203, 210, 211 (1948). The Courts must also include the Selective Service System in this prohibition.

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* To list just a few:

Sicurella v. *U. S.*, 348 U. S. 385 (*supra*);
Annett v. *U. S. A.*, 205 F. 2d 689 (C. A. 10th, 1953);
Kretchet v. *U. S.*, 284 F. 2d 561 (C. A. 9th, 1960);
Mayfield v. *U. S.*, 220 F. 2d 729 (C. A. 5th, 1955);
U. S. v. *Lauing*, 221 F. 2d 425 (C. A. 7th, 1955);
Shepherd v. *U. S.*, 220 F. 2d 855 (C. A. 9th, 1955);
Riles v. *U. S.*, 223 F. 2d 786 (C. A. 5th, 1955);
Hinkle v. *U. S. A.*, 216 F. 2d 8 (C. A. 9th, 1954);
Clementino v. *U. S. A.*, 216 F. 2d 10 (C. A. 9th, 1954).

In *Abington School District* v. *Schempp* (1963), 374 U. S. 203, Mr. Justice Clark expressed the views of eight members of the Court, when, in quoting from the unpublished opinion of Judge Alphonso Taft, in *Minor* v. *Board of Education of Cinc.*, he stated that the ideal of our people as to religious freedom is one of "absolute equality before the law, of all religious opinions and sects . . . " Mr. Justice Clark continues by stating that "neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." Then he goes on to affirm that it is not within the power of government to invade that inviolate citadel of the individual heart and mind whether its purpose or effect be to aid or oppose, to advance or retard any religious belief. "In the relationship between man and religion, the State is firmly committed to a position of neutrality." Can the selective service board consistently be excluded from that commitment, where a Catholic conscientious objector is involved? This is a question which must now be decided by this Court.

In *U. S.* v. *Seeger*, 380 U. S. 163, 195 (1965) the Court has stated that the very purpose of Congress in using the expression "Supreme Being" rather than some other designation was so "as to embrace *all religions*". (Italics ours.) The Catholic religion was included.

The protection of religious freedom is not restricted to any one group or any one type of religion; nor to orthodox religious practices and beliefs. *U. S.* v. *Ballard*, 322 U. S. 78; *Watson* v. *Jones*, 13 Wall. 679, 728.

It is not the business of courts to say that what is a religious practice or activity for a given group is not religion under the protection of the First Amendment. *Fowler*

v. *Rhode Island,* 348 U. S. 67, 69-70 (1951). See also *Neimotko* v. *Maryland,* 340 U. S. 268, 272 (1953).

For the Selective Service System and the Courts to accept Jehovah Witnesses, as conscientious objectors, who would fight in a Theocratic War and who would kill under certain circumstances, and to reject Catholics, as conscientious objectors, who would fight in a Just War by Thomistic criteria, is in direct violation of the Free Exercise Clause of the First Amendment. *Sherbert* v. *Werner,* 374 U. S. 398 (1963). It denies to followers of the Catholic faith the equal protection of the law, by preferring other religions over the Catholic religion, thereby running afoul of the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe,* 347 U. S. 497 (1954).*

III.

The Court of Appeals has disregarded the current trend of the United States Supreme Court to erect safeguards against erosion or waiver of constitutional rights by hard-pressed defendants charged with crime.

Under the Administrative Procedures Act, 5 U. S. C. Sec. 1005 (a), Congress has provided for every party in any agency proceeding to appear in person or by or with counsel. By 50 U. S. C. App. 463 (b), the administrative processing under the selective service system was expressly removed from the application of the Administrative Procedures Act. Moreover, by authority of 50 U. S. C. App. 460 (b)(1) the President was authorized to prescribe rules and regulations for this Act. The rule was made that no

* "Discrimination may be so unjustifiable as to be violative of due process."

registrant may be represented before the local board by anyone acting as attorney or legal counsel, and this was embodied in 32 C. F. R. 1624.1(b). Thus the petitioner had no legal advice or representation at any point in his selective service processing.

Selective Service Regulation, 32 C. F. R. 1604.71 provides for the appointment of government appeal agents and associate government appeal agents, and under subdiv. (c) these government appeal agents shall, whenever possible, have legal training and experience.

After an unanimous decision by the Appeal Board, unfavorable to the registrant, the government appeal agent is empowered, under C. F. R. 1626.61(b), to request a reconsideration of the appeal board's determination, at any time within 10 days after the date when the local board mails a notice of classification to the registrant, or at any time before an induction order is mailed. Thus is a registrant given a minimal benefit of some legal advice and representation.

Notice is of the very essence of the rudimentary requirements for fair play in safeguarding property rights. *Walker* v. *Hutchinson,* 352 U. S. 112 (1956); *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U. S. 306 (1950). *A fortiori* does this principle apply in the case of human rights. Where the registrant does not have direct notice of the existence of the government appeal agent, or direct notice that the agent has 10 days in which to request reconsideration, the registrant cannot avail himself of this legal assistance. This irreparably prejudices his post-appeal relief, and is a step toward his ultimate conviction. When the Local Board mails him an induction order in

six days, the already restrictive minimal legal protection afforded a registrant is swept into the dustbin.

This denial of counsel to registrants during their processing was the source of great concern to Judge James D. Doyle in *U. S.* v. *Wierzchucki,* 248 F. Supp. 788 (D. C., W. D. Wisc. 1965).

In a series of landmark decisions, this Court has upheld the constitutional rights of defendants charged with crimes involving moral turpitude. If there is any waiver of constitutional rights, it is the burden of the Government to show that they have been knowingly and intelligently waived. *Miranda* v. *Arizona,* 384 U. S. 436 (1966); *Malloy* v. *Hogan,* 378 U. S. 1 (1964); *Escobedo* v. *Illinois,* 378 U. S. 478 (1964); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Douglas* v. *California,* 372 U. S. 353 (1963); *Mapp* v. *Ohio,* 367 U. S. 643, 685 (1961).

In the case of a conscientious objector whose act is *malum prohibitum* and who is also hard-pressed because his religious training and belief forbid the violation of his conscience, the Government, by the adroit argument that no prejudice has been shown to the registrant by these denials of basic procedural due process, has contrived to have the conscientious objector bear the burden of proving innocence. Thus the presumption against waiver of constitutional rights and the presumption of innocence, until guilt is proven beyond a reasonable doubt, which follow some of our most hardened criminals, do not exist for the conscientious objector seeking to follow his religious training and belief. For him these presumptions have gone down the same thorny path to extinction as have lack of notice and lack of legal assistance and advice.

CONCLUSION

It is respectfully urged that this Court should grant certiorari to the Court of Appeals for the Third Circuit, to the end that the judgment below may be reversed and the petitioner may be given the I-O classification he merits.

Respectfully submitted,

ESTHER STRUM FRANKEL
Counsel for Petitioner